



TRUSTS

Last Reviewed: 16 March 2012

**** Military attorneys performing legal assistance do not create trusts ****

DISCLAIMER: This handout has been produced by the office of the Staff Judge Advocate, 66 ABG/JA, Hanscom AFB, MA 01731. This handout is for general guidance only. It is not meant to be a substitute for legal advice and it cannot be cited as legal authority. Before taking any action, you should consult an attorney for guidance.

OVERVIEW

A trust is a legal relationship set up by a donor (trustor) under which one or more trustees hold property, generally under a written instrument, for the benefit of one or more beneficiaries. People are motivated to create trusts for various reasons:

- (1) To help manage their assets both before and after death, as part of a comprehensive estate plan;
- (2) To protect the beneficiary by giving control of the trust fund to the trustee and by limiting the beneficiary's rights to receive income or principal;
- (3) To reduce income or estate taxes by transferring to another person both the benefit and tax liability of certain property;
- (4) To assure immediate ("stand-by") protection in the event of illness or disability; and
- (5) To help reduce administrative and probate costs and delays upon death.

If you are thinking of creating a trust for the benefit of yourself or another person, you should ask: What do I hope to accomplish? Will a trust help? How much will it cost to establish and administer such a trust? Whom shall I select as a trustee? Prior to answering these questions, you should consult an attorney to review the applicable state law and the implications of your likely choice. You should create a trust *only* when there is a need and when the economic benefit justifies it.

CREATION

Trusts concerning land can be created only by *written* instrument signed by the person creating it or by his or her attorney (M.G.L. c. 203 § 1), whereas trusts of personal property may be created orally (186 Mass 108, 71 N.E. 109).

During Your Lifetime

You may want to create a trust to manage specific lifetime purposes, for example:

- (1) To relieve yourself of the burdens of asset management;
- (2) To formulate a flexible estate plan;
- (3) To finance a child's education;
- (4) To support an elderly parent;
- (5) To shift income and the tax liability for a limited or extended period of time;
- (6) To make a charitable gift; and
- (7) To avoid disclosure of assets in probate.

DISCLAIMER: This handout has been produced by the office of the Staff Judge Advocate, 66 ABG/JA, Hanscom AFB, MA 01731. This handout is for general guidance only. It is not meant to be a substitute for legal advice and it cannot be cited as legal authority. Before taking any action, you should consult an attorney for guidance.

Upon Your Death

You may create a trust that will take effect upon your death. This trust will function:

- (1) To receive your estate, life insurance and other death benefits;
- (2) To provide for your surviving spouse and children; and
- (3) To reduce or avoid the costs and time associated with a lengthy probate process.

NOTE: This type of trust may be accomplished by either (1) creating an inactive trust during your lifetime, funding it with only a nominal amount, and then directing by your will or otherwise that assets be “poured over” into that trust upon your death or (2) by writing the trust into your will; this is called a *testamentary* trust and becomes effective after your death and the completion of the lengthy probate process.

TRUSTEES

Selection

One of the most difficult tasks is to choose the right trustee(s). You may choose as your trustee or trustees an individual and/or a bank authorized to exercise trust powers (a corporate trustee). You should name a successor trustee in the event that the primary trustee is unable or unwilling to serve. Some factors that you should consider in your choice are:

- (1) Does the trustee understand what you are trying to accomplish?
- (2) Does the trustee have experience with financial responsibilities?
- (3) Will the trustee understand the beneficiary’s needs?
- (4) Is it likely that the trustee will be able to serve and be available for the full term of the trust?
- (5) Will the fees for services of a trustee be reasonable and affordable to you?

A Trustee’s Duties and Fees

The Trust itself will prescribe many of the duties of a trustee, though the state law under which the trust is executed will provide the rest. The trustee must manage the trust assets, invest them, keep records, prepare tax returns, make regular distributions of income (if required), and account to the beneficiaries. The trustee has a duty of loyalty and good faith, known as a *fiduciary duty*, to the beneficiaries of the trust. The trustee should be available to the beneficiaries to discuss the management and administration of the trust assets as well as the needs and objectives of the beneficiaries.

In Massachusetts, the court ultimately determines whether the trustee’s fees are reasonable. Other states have similar rules. Many corporate trustees (such as banks and trust companies) base their fees on a percentage of the income and a percentage of the principal each year. Banks publish “fee schedules” which are available to the public on request.

Instructions to the Trustee

Remember that you are the author of your trust. You define its terms. You provide the guidelines under which the trustee will perform duties. Your instructions may be simple or complex, but they should be clear. Provisions for the distribution or accumulation of income and/or principal, the terms upon which your trust may be amended, who will be your successor trustee and a host of other issues must be expressly included in the trust documentation. Each of these decisions can have far-reaching consequences for yourself and your beneficiaries. These decisions should be made only after consultation with your lawyer and should be stated in a will or trust instrument prepared by him or her.

DISCLAIMER: This handout has been produced by the office of the Staff Judge Advocate, 66 ABG/JA, Hanscom AFB, MA 01731. This handout is for general guidance only. It is not meant to be a substitute for legal advice and it cannot be cited as legal authority. Before taking any action, you should consult an attorney for guidance.

TRUST TAX ADVANTAGES

There are various types of trusts for you to consider in your individual, family and business planning. There can be significant tax advantages to you, your estate or your beneficiaries if you create a trust. While not every type of trust is intended to produce a tax benefit, your lawyer can show you how skillful trust planning may help you to save or at least defer the high cost of income, estate or gift taxes. If you already have a trust plan, have a lawyer review it because there have been sweeping changes in the federal tax laws brought about by the Tax Reform Act of 1976, the Revenue Act of 1978, the Economic Recovery Act of 1981, the Tax Reform Act of 1986, and the Budget Reconciliation Act of 2001. Additionally, the Massachusetts Estate Tax law, adopted in 1992, provides significant state tax law changes. Whatever the state, check the laws and consult an attorney prior to choosing a path. When you create a trust, you should keep in mind that tax treatment is only one factor that should be considered together with your non-tax planning needs.